



AFL-CIO

# California School Employees Association

2045 Lundy Avenue  
San Jose, CA 95131

(408) 473-1000  
(800) 632-2128

Executive  
FAX (408) 321-8227

First Floor  
FAX (408) 954-0948

[www.csea.com](http://www.csea.com)

Rob Feckner  
*Association President*

Bud Dougherty  
*Executive Director*

*Member of the AFL-CIO*

*The nation's largest  
independent classified  
employee association*

*Member of the National  
Association of Classified  
School Employees  
(NACSE), representing  
independent public  
employees throughout  
the nation*



April 5, 2007

**Sent by Facsimile (916) 327-6377 and Mail**

PUBLIC EMPLOYMENT  
RELATIONS BOARD  
HEADQUARTERS OFFICE  
2007 APR -6 AM 9:30

Ms. Tami R. Bogert, General Counsel  
Mr. Les Chisholm, Division Chief, Office of the General Counsel  
Public Employment Relations Board  
1031 18<sup>th</sup> Street  
Sacramento, CA 95184

**Re: Comments on Proposed Revisions to Proof of Support Regulations**

Dear Ms. Bogert and Mr. Chisholm:

Please accept this letter as the California School Employees Association's response to PERB's proposed revisions to its "Proof of Support" regulations, which are scheduled for public comment on April 12, 2007. CSEA represents approximately 210,000 classified employees who are covered by the Educational Employment Relations Act ("EERA") to which these proposed regulations apply.

CSEA vigorously objects to the proposed changes in the PERB regulations, because they would effectively nullify the legislation authorizing card check certification as a method of determining whether employees choose to be represented by a union. In the 2003 amendment, to Government Code section 3544.1, Senate Bill 253, (hereafter "SB 253"), the Legislature specifically removed an employer's ability to insist upon a recognition election, and specifically concluded that card check is an accurate and expeditious method for determining that employees choose to be represented by a union.<sup>1</sup> In labor law, "card check" has been a term of art for more than 70 years, and it has been well established under PERB law for voluntary recognition. Card check means that if a majority of the employees in a bargaining unit sign a card authorizing the union to represent them, the union is recognized as the bargaining agent for the unit. PERB has never required that the card contain a notice to employees that signing a card means that an election may not be required. The California Legislature certainly knew what it was doing when it specified that card check will be accepted as a valid method for securing union recognition.

The EERA has always recognized union representation by card check, when an employer did not object to the certification; it is called voluntary recognition. In SB 253 the Legislature simply decided that the standards acceptable for voluntary recognition by an employer will apply to all recognition situations. The only

<sup>1</sup> Senate Committee, Labor and Industrial Relations, (Analysis of SB 253) (2003-2004 Reg. Sess.), March 26, 2003, at pp. 2- 3, Comments.

change in SB 253 is that an employer is no longer allowed to require an election, before recognizing a union's majority status.

In providing for mandatory card check recognition, the Legislature has authorized a process for PERB to quickly decide if a union has majority support and has authorized elections only when competing unions campaign to represent the same employees.

Therefore, PERB should set up a simple process for unions to present their proof of support, and should quickly certify the union when the proof has been provided. Instead, PERB has set up a complicated system which will result in long delays and which will allow for obstructions in the card check process, without providing any benefit to employees. PERB's process frustrates the legislative intent to streamline and simplify the process of attaining union recognition.

It is no accident that the Legislature enacted SB 253 at a time when employers in the private sector routinely threaten, discourage and deprive employees of their right to be represented and when delaying tactics, including forcing elections, are used to prevent representation of employees. These Proposed Regulations are antithetical to both the letter and the spirit of SB 253 and are likely to do mischief to a system that has been working for the parties.

The requirement that the cards "demonstrate that the employee understands that an election may not be conducted," in section 32700(a)(1) in particular seeks to undo the changes made by SB 253 and to treat card check recognition as a second class method for employees to decide to choose a union. It is important for PERB to be an honest broker and to certify majority support when employees decide to choose a union. PERB's regulations should not prevent the statute from working as the Legislature intended.

CSEA has specific objections to particular provisions in these regulations which are set forth herein.

**I. CSEA Objects to the Requirement in Section 32700(a)(1) that Proof of Support Must State that the Employee Understands that an Election May Not Be Conducted.**

**A. The Change to the Proof of Support in Section 32700(a)(1) Goes Beyond PERB's Rule Making Authority.**

CSEA vigorously objects to section 32700(a)(1) "proof of support," that requires,

...Proof of support submitted with a request or petition requiring recognition of the petitioning employee organization as the exclusive representative of affected employees without an election **must also clearly demonstrate that the employee understands that an election may not be conducted.**

Section 32700(a)(1) is a back door attempt to repeal SB 253 and to reinstate representation elections as the primary method to determine whether a union will represent the employees. This change clearly violates SB 253. SB 253 amends Government Code section 3544.1 to require an employer to recognize an employee organization as the exclusive representative on the basis of card check.

The Legislative summary specifically states that the legislation:

**repealed the existing authority of a public school employer to request a representative election except for specified reasons....**

(Senate Rules Comm., Office of Sen. Floor Analysis, Third Reading Analysis of Senate Bill No. 253 (2003-2004 Reg. Sess.), May 7, 2003, p. 1.)

The legislation does not allow an employer to insist upon representational elections. Neither does the legislation authorize PERB to require anything further than an authorization card as proof of support. Thus the Legislature has determined that elections are not necessary, unless there is a contest between rival unions to represent the employees.

**B. SB 253 Applies the Existing Standards for Voluntary Recognition to Card Check Recognition.**

In SB 253, the Legislature has applied the already existing standards for voluntary recognition by employers to card check recognition. In the voluntary recognition situation, PERB has never felt it necessary to ensure that employees "understood that an election may not be conducted." The Legislature has not authorized PERB to make any additional requirements for card check recognition.

The employees' awareness of the significance of the documents that they are asked to sign is the same, whether a union card is accepted by the employer as part of a voluntary recognition, or if the employee is signing a card to be presented under the new card check provisions. PERB's change does not provide any greater protection to employees, but instead allows employers to impose an additional hurdle to prevent or delay the representation of its employees by a union. Section 32700(a)(1) makes the required demonstration of employee knowledge dependent upon whether or not the employer voluntarily agrees to recognize the union.

SB 253 clearly removes the employer's power to require an election before recognizing a union. Section 32700(a)(1) is an attempt to place roadblocks on the legislation, and to reverse the statutory authorization for card check recognition by making it unworkable.

Employees have every right to sign union authorization cards, and also to decline to sign authorization cards. PERB has authority to investigate fraud or abuse. Therefore, the rights of employees are already protected. The only purpose for requiring this "demonstration" is to discourage card check as a means to confer exclusive representative status on a union, despite the

change in the law. Employers use delays to discourage employees who want representation. PERB representation proceedings have been delayed for months and years. During the time that PERB proceedings drag on, the employees are not represented and the employer can continue to run things as it sees fit. The Legislature has made a policy decision that this process should be changed. PERB can not repeal the law by regulation.

**C. Section 32700(a)(1) is Contrary to the Statute, Government Code Section 3544.(a), Which Sets Forth the Appropriate Proof of Majority Support that a Union May Provide.**

In SB 253, the Legislature left intact Government Code section 3544(a), which sets forth the evidence that a union can present to show proof of majority support. The statute provides that majority support can be shown as follows:

*The request ...shall be based upon majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees....(Government Code section 3544.) (Emphasis supplied.)*

Section 32700(a)(1) is improper, because it prevents a union from using the precise evidence of support that Government Code section 3544(a) allows to show support. Dues deduction authorizations, notarized membership lists, and membership cards by their very nature do not contain any statement that there may not be an election. The Legislature has determined that these documents are sufficiently reliable that they can be used to show proof of support. The statute provides an objective standard for PERB to use to determine if there is support for the union, as an alternative to an election.

Authorization cards simply state that the union is authorized to act as the employee's representative in dealing with the employer over wages, hours, and terms and conditions of employment. Clearly, if the Legislature believed that it was important to require an employee acknowledgement that an election might not take place, or to provide for a different proof of support, it could have changed the recognition provisions in section 3544(a) or added a provision to section 3544.1 to so state. The Legislature did not do so, and PERB has no ability to change the statute.

**II. Under Proposed Regulation 32700(g) Any Complaint Could Sabotage a Card Check Certification.**

PERB has long-standing procedures for determining the validity of proof of employee support under Regulation 32700(g), which require an objecting party to provide prima facie evidence of fraud or coercion. The proposed regulation removes the requirement that the complaining party provide prima facie evidence that the proof of support is tainted by misconduct. The change

would require an investigation and would unreasonably delay certification, whenever any party provides declarations contending that the proof of employee support was obtained by fraud or coercion. This change is particularly one-sided because there is no provision to address fraud or coercion committed by anti-union groups who are attempting to revoke cards.

Section 32700(g) provides:

(g) Any party which contends that proof of employee support was obtained by fraud or coercion, or that the signatures on such support documents are not genuine, shall file with the regional office evidence in the form of declarations under penalty of perjury supporting such contention within 20 days after the filing of the petition which the proof of support accompanied. The Board shall refuse to consider any evidence not timely submitted, absent a showing of good cause for late submission. ~~When prima facie evidence is submitted to the Board supporting a claim that proof of support was tainted by such misconduct, the Board shall conduct further investigations.~~ If, as a result of such an investigation, the Board determines that the showing of support is inadequate because of such misconduct, the petition shall be dismissed.

This regulation would trigger an investigation with attendant delays any time an employer challenges a union's proof of support. Such a regulation will assure that card checks will be regularly challenged. The employees' free choice can be obstructed, simply by making a complaint, under the standard established by section 32700(g). There is no reason for PERB to delay the certification of a union on the basis of unfounded complaints, except to prevent the card check process from working effectively.

### **III. The Revocation of Support Set Forth in Section 32705 Is Not Authorized by Government Code Section 3544 or 3544.1.**

CSEA objects to the revocation process set forth in proposed regulation section 32705(b) and (c). There is no provision in the Government Code section 3544 or 3544.1 for an employee to revoke proof of support. PERB is treating card check recognition as though it were an inferior method for showing employee support. In SB 253, the Legislation has clearly provided that card check is a legitimate and preferred method of selecting a union representative.

Assuming for purposes of argument that revocation of authorization cards were to be authorized, at the very least a regulation should provide that such revocations must be:

1. individually mailed by the employee to PERB,
2. served on the union
3. filed before the proof of support is filed with PERB, and
4. not be accepted if there is evidence that the employer has solicited the revocations.

CSEA objects specifically to PERB's proposed section 32705(b)(2) and (c).

Section 32705(b) states that a revocation must:

(b)(2) Be contained in an individual card or letter signed by the employee and **furnished to PERB by the employee.**

This regulation should state that revocations must be individually mailed to PERB by the employee.

Additionally, CSEA objects to the language in section 32705(c) which does not even require PERB to give notice to the union that employees have revoked their support.

(c) The proof of support determination issued by the Board shall take into account all valid revocation requests but shall not disclose the identities of the employees involved.

When the proof submitted constitutes a notarized membership list, or a union membership application, the proof cannot be revoked unless the employee gives notice to the union. More importantly, if PERB keeps secret from the union information concerning which employees have revoked their support, the union can neither properly investigate employer coercion, nor conduct a viable campaign for representation.

If an employee wishes to revoke his authorization to represent, the regulation could provide that the employee can serve the revocation upon the union before the union serves its proof of support upon PERB. This procedural time limit will protect an employee's right to change his or her mind, but will not delay card check recognition.

Unless the employer is removed from any revocation effort, this process will completely pervert the legislative intention to provide for card check certification. This regulation is a trap which on the one hand provides opportunities for employer fraud and coercion, and on the other hand keeps a union from access to information concerning such coercion.

### **Conclusion**

The Legislature has adopted standards for card check recognition which PERB is bound to follow. The proposed regulations set up roadblocks which will sabotage the effective implementation of the statutory requirement. CSEA's objections to the regulations are as follows.

First, the statute provides for card check recognition. Card check is a commonly understood term meaning that a union is recognized when a majority of the employees in the unit sign a card authorizing a union to represent them. The statute does not require any notice to be placed on

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the cards that signing a card means that there may be no election, and PERB has no authority to add this requirement.

Second, PERB's decision to conduct an investigation in a card check certification, without requiring a prima facie case, shows disrespect for the Legislature's determination that card check is a valid method of certification. This proposed regulation will encourage complaints and will make the process unworkable.

Third, the statute contains no provision for revoking cards. Assuming for purposes of argument that an employee may revoke a card, the proposed regulation fails to require notice to the union that a card has been revoked, to require the employee to mail the revocation individually to PERB, to require revocations to be filed before the union's proof of support has been filed, or to prohibit employer solicitation of revocations. The Proposed Regulations encourage employers to abuse PERB's process and to prevent employees from exercising their right to a simplified procedure for card check certification.

CSEA urges PERB to adopt regulations that provide for card check recognition as the Legislature intended.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen C. Whelan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Maureen C. Whelan  
Lead Staff Attorney